TAN ENG CHOONG

v.

FOO KAI YUEN & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C22-165-86]
27 JULY 1987

CIVIL PROCEDURE: *Summary order - Order 43 r. 1(1) of Rules of the High Court - Partnership - Right to an account - Partnership Act 1961 - Contract Act - Whether applicable or not?*

The 1st defendant had invited the plaintiff to join him as a partner in his law practice. The plaintiff accepted the invitation and they practised under the name and style K.Y. Foo & Co. After 2 years as partners the 1st. defendant informed the plaintiff that he should leave the practice. The plaintiff left the practice at the end of February 1984.

In 1986 the plaintiff sought for an account from the plaintiff in respect of the firm and for certain consequential orders. The plaintiff took out an application under O. 43 r. 1(1) and obtained a summary disposal of the claim.

The 1st defendant appealed against the decision of the learned Senior Assistant Registrar.

Held:
Allowing the appeal with cost;

[1] the issue as to whether a partnership exists or not is far from clear and therefore a summary order under O. 43 r. 1(1) was misconceived, and

[2] the order of the Senior Assistant Registrar is set aside.

Legislation referred to:
Contract Act 1950, ss. 13, 14(e)
Rules of the High Court 1980, O. 43 r. 1(1)

For the plaintiff/respondent - Cyrus Dass (P.H. Yeo with him); M/s. Shook Lin & Bok
For the defendants/applicants - Dominic Puthuchearry; M/s. Skrin & Co.

JUDGMENT

VC George J:
[On Enclousure (9)]

The 1st defendant appealed against the decision of the learned Senior Assistant Registrar in respect of the summary order he had granted for accounts pursuant to O. 43 r. 1(i) of the Rules of the High Court.

The 1st defendant had invited the plaintiff to join him as a partner in his law practice. The plaintiff accepted the invitation and they practised under the name and style K.Y. Foo & Co. The plaintiff says that the terms of the partnership agreement are as set out in a letter he had drafted which is exhibited as TEC1 to the plaintiff's affidavit encl. (4). The 1st defendant on the other hand says that TEC1 does not reflect all the terms of the partnership agreement. He says that the terms are as set out in para. 2(b) of the statement of defence.

After the two parties functioned as partners for about a year it would appear that the 1st defendant informed the plaintiff that he should leave the partnership. The plaintiff thereupon sent a letter of resignation to the 1st defendant to be effective on 30 March 1984 but the 1st defendant told the plaintiff that he should leave at the end of February 1984. The plaintiff left the practice.

In 1986 the plaintiff caused this writ to issue and sought thereby for an account from the 1st defendant in respect of the firm and for certain consequential orders. The plaintiff went on to take out an application under O. 43 r. 1(i) and obtained a summary disposal of the claim for an account and the consequential orders.

The 1st defendant had contended and contends in the appeal that the plaintiff is not entitled to an account in respect of the legal practice on the grounds that the plaintiff in fact had never been a partner of the firm. It was contended that the position that obtains in this case was that the plaintiff had functioned on the basis that the terms of the partnership were as set out in the draft of his said letter TEC1 whereas the 1st defendant had functioned on the basis that the terms were as set out in para. 2(b) of the statement of defence. The 1st defendant's contention is that in that situation there was in fact no contract within the meaning of the Contracts Act between the parties and that accordingly there had been no partnership and as such the 1st defendant was not obliged to render an account in respect of the firm to the plaintiff.

In answer to this submission it was suggested on behalf of the plaintiff that the provisions of the Contracts Act had no relevance to a partnership. I find no merit in such a contention. A partnership is a contractual relationship which subsists between persons carrying on business in common with a view to profit. The mutual rights and duties of the partners may be set out in a partnership agreement or deed and if not are as provided in Part IV of the Partnership Act 1961.

> 21. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.
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> 22. ...
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> 23. ...
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> 24. ...
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> 25. ...
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> 26. The interests of partners in the partnership property, and their rights and duties in relation to the partnership, shall be determined, subject to any agreement, express or implied, between the partners, by the following rules:
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> (a) all the partners are entitled to shares equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm;
>
> (b) the firm must indemnify every partner in respect of payments made and personal liabilities incurred by him -
>
> (i) in the ordinary and proper conduct of the business of the firm; or
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> (ii) in or about anything necessarily done for the preservation of the business or property of the firm;

(c) a partner making, for the purposes of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of eight per cent per annum from the date of the payment or advance;

(d) a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him;

(e) every partner may take part in the management of the partnership business;

(f) no partner shall be entitled to remuneration for acting in the partnership business;

(g) no person may be introduced as a partner without the consent of all existing partners;

(h) any differences arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners; and

(i) the partnership books are to be kept at the place of business of the partnership (or the principal place, if there are more places than one) and every partner may, when he thinks fit, have access to and inspect and copy any of them.

The scheme of the Partnership Act in general and the terms of Part IV thereof in particular make it clear and it is my judgment that the provisions of the Contracts Act have application to a partnership agreement or deed.

Accordingly, it is relevant to look at some sections of the Contracts Act, *viz*;

10. (1) All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

11. ...

12. ...

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

14. Consent is said to be free when it is not caused by -

(a) coercion, as defined in s. 15;

(b) undue influence, as defined in s. 16;

(c) fraud, as defined in s. 17;

(d) misrepresentation, as defined in s. 18; or

(e) mistake, subject to ss. 21, 22 and 23.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.

In the instant case the 1st defendant appears to be invoking s. 13 of the Contracts Act to be read with s. 14(e) in saying that what had happened was that the plaintiff and the 1st defendant had not agreed upon the same thing in the same sense and that accordingly the agreement between the parties cannot be said to have been made with the free consent of the parties and that accordingly there was no contract between the parties.

This might lead to some absurd conclusions and consequences but at this stage of the proceedings the Court is in no position to conclude that it is clear that the 1st defendant is an accounting party. It seems to me that the Court could eventually after trial arrive at one of 3 conclusions:

(1) That there was a partnership in terms as set out in Exhibit TEC1.

(2) That there was a partnership in terms as set out in para. 2(b) of the statement of defence.

(3) That the plaintiff was under the impression that the terms were as set out in TEC1 and the 1st defendant was under the impression that the terms were as set out in para 2(b) of the statement of defence.

If the Court concludes that there was an agreement between the parties in the terms of (1) and (2) above then it will be held that there was in existence a partnership between the parties and accounts will be ordered to be rendered. If, however, the finding is as per (3) above then the Court could very well conclude that the contract of partnership was not made by the free consent of the parties in that they had not agreed upon the same thing in the same sense. As has been seen earlier, it could be envisaged that this might lead to some absurd consequences which possibility may be put forward as an argument in support of the contention that the Court should no arrive at such a conclusion. Be that as it may, as I have stated earlier, the position is far from clear and as such moving the Court for a summary order under O. 43 r. 1(i) was misconceived.

The appeal is allowed with costs. The order of the Senior Assistant Registrar of 28 November 1986 is set aside.

Also found at [1988] 2 CLJ 691